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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Miltons LLP 225 Metcalfe Street Suite 700 Ottawa, ON K2P 1P9 CANADA			GRAHAM, MARK S	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/672,060	Applicant(s) FITZGERALD ET AL.	
	Examiner Mark S. Graham	Art Unit 3711	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 February 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 14-30, 33-39, 41-45, 53-56, 60-69 and 72-75 is/are pending in the application.
- 4a) Of the above claim(s) See Continuation Sheet is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 37-39, 41-45, 53, 54, 60/53, 60/54, 61/53, 61/54, 63/53, 63/54, 64-66, 67/37-39, 67/53, 67/54, 68/37-39, 68/53, 68/54, 69/53, 69/54, 75 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 07 February 2008 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>12/21/07</u> . | 6) <input type="checkbox"/> Other: _____ |

Continuation of Disposition of Claims: Claims withdrawn from consideration are 14-30, 33-36, 55, 56, 60/55, 60/56, 61/55, 61/56, 62, 63/55, 63/56, 67/55, 67/56, 68/55, 68/56, 69/55, 69/56, 72-74.

Newly submitted claims 73 and 74 directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: Claim 73 including the particularly claimed dimensions is directed to an embodiment including a stiffener as discussed in the previous action and below. Claim 74 is directed towards the Fig. 7 embodiment. Applicant has not admitted for the record that the stiffener embodiment or the Fig. 7 embodiment is an obvious variant of the elected Fig. 6 embodiment.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 73 and 74 have been withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Applicants' remarks directed towards the restriction requirement originally made 8/31/05 have been considered. All of the claims supported by the Fig. 6 embodiment and its description as set forth in paragraph 64 of the original specification have been examined. The examiner has again reviewed the original disclosure including the specification, drawings, abstract, and claims, to see which of the currently pending claims read on the Fig. 6 embodiment. Those claims not supported by the original disclosure have been restricted out and withdrawn from consideration as described on the cover sheet of this action.

Again, based on original claim 13, the examiner agrees that the 5% limitation is adequately supported within the Fig. 6 embodiment. As was previously determined by

the examiner, a midsection sweetspot length of 12.5% to something less than 100% is supported within the Fig. 6 embodiment by virtue of the paragraph 16 text discussing the sweetspot length vs. the barrel length for the bats of the invention. However, because each of claims 41, 45, and 63 are inclusive of values less than 12.5% they have been rejected under 35 U.S.C. 112 first paragraph, which is set forth below, as containing new matter.

The original text of paragraph 62 and applicants' subsequent attempts to amend it have also been again reviewed for any basis which might be applied to the Fig. 6 embodiment.

Again, the language pertaining to the link between the barrel wall thickness as disclosed with regard to Fig. 6 and the stiffener thickness as originally disclosed is considered new matter. Obviously this includes introductory language such as stating that the stiffener and barrel thickness vary to "the same extent and manner."

In particular regarding this issue, the disclosed thickness of the stiffener and the statement that an alternative solution is to use a thickened barrel have again been reconsidered. However, it remains the examiner's opinion that one cannot necessarily read that when using a thickened barrel to achieve an "alternative solution" the exact same thickness used when using a stiffener should also be used. There is certainly no statement to this effect, and there is no discussion of what differences or similarities might occur in the "alternative solution" depending on what thickness of barrel is used. Further, some inherent structural differences would have to be present between an insert which is bonded to a bat, and a bat which is constructed with simply thicker

material. Therefore, claims based on the .005" to .040" thickness must be considered to be directed at the stiffener embodiments alone.

Likewise, the "flattened batting performance" graph language of claims 14-30, 33-36 and 52 pertains solely to the embodiments utilizing a stiffener element. Paragraph 60 of the original disclosure is very specific in stating that Figure 10 pertains to an example with a stiffener element. Applicants' attempt to bootstrap the language of paragraph 62 into the description of the Fig. 6 embodiment are not persuasive as explained above, and the further jump to suggest that the "alternative solution" will also provide the graph depicted in Fig. 10 is completely unsupported in the original disclosure.

The 1" to 2" language of claim 62 contains the same problem. It can only be supported by making the assumption that each dimension disclosed with regard to the stiffener necessarily follows with regard to a barrel region as disclosed with regard to the Fig. 6 embodiment. For the reasons explained above, this assumption is not tenable.

Regarding the 8 1/3% language of claim 72, such lacks support in the original disclosure for the reasons explained in the 2/7/06 paper and the applicant still has shown no basis for this language with regard to the Fig. 6 embodiment. Therefore, claim 72 is withdrawn as not being directed towards the elected Fig. 6 embodiment. Regarding, applicant's derivation of the 8 1/3% figure, applicant has taken specific points from two separate ranges and then combined them together to obtain the 8 1/3%

figure. Nowhere in the original disclosure is there basis for taking and combining these two particular points together to obtain a limiting value.

The amendment filed 10/6/06 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure remains as follows:

The disclosure with regard to Fig. 6 in paragraph 62 lacks basis in the original disclosure and thus represents new matter. The thickness specifically discussed in the original disclosure only pertain to the embodiments having a stiffener 18. The Fig. 6 embodiment does not offer this feature but instead includes a section 20 of the bat which adjusts the stiffness by means of fiber type or angle change or barrel thickness with no discussion of any particular barrel thickness. Again, the more narrowly focused ranges of the stiffener wall thickness, and the inclusion that the barrel wall thickness is also in these ranges represents subject matter with no support in the original disclosure.

The added limitations to original paragraph 64 represent new matter. There is not support for using "layout density" to modify the barrel wall characteristics with regard to the Fig. 6 embodiment. It is agreed that the term "layout density" is adequately supported in the original disclosure. In response to applicant's remarks the use of "layout density" with regard to the Fig. 6 embodiment is not disclosed. In fact it is specifically missing in the original disclosure describing the Fig. 6 embodiment which instead is disclosed particularly as using fiber type, fiber angle, fiber size, and thickness.

Regarding applicant's arguments over the new matter objections and rejections based on MPEP 2163.06, the passage cited relates to subject matter which is adequately described in one part of an application as relating to an aspect of the invention, being added to another part of the application describing that aspect of the invention. This was the basis for the examiner's finding that claim 13 of the claims section adequately supported inclusion of the feature with regard to the Fig. 6 embodiment as described in the specification. However, this is not the same as saying that whatever is disclosed with regard to one embodiment of an invention automatically follows with regard to another embodiment of the invention and therefore may be added thereto.

Concerning the particularly claimed thickness subranges and the arguments thereover on page 16 of the remarks attention is directed to the 7/14/06 office action which discusses *Wertheim* and MPEP 2163.05.

With regard to values less than 12.5% as argued on page 17 of the remarks the applicant seeks support in passages which "admit to the possibility that the ration of the mid-section to total barrel length is less than 12.5%." In response the examiner notes that a possibility is not evidence of intent. Anything is "possible." The question is what would have been reasonably been conveyed to one reading applicant's original disclosure. Applicant has not shown that less than 12.5% is reasonably apparent. Moreover, there is certainly no disclosure of such a value with regard to the non-stiffener element embodiment of Fig. 6.

Applicant is required to cancel the new matter in the reply to this Office Action.

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The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 41, 45, and 63 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. As pointed out above, while there is support for lengths between 12.5% and close to 100% of the length of the barrel concerning the mid-section there is not support for less than 12.5% with regard to the Fig. 6 embodiment. Each of the claims is inclusive of this range and therefore contains new matter with regard to the original disclosure.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 38, 67/38, 68/38, and 45/38 are rejected under 35 U.S.C. 102(e) as being anticipated by Vacek. Vacek's insert 112 provided in the center of the barrel contains layers of fibers and thus this portion of the bat barrel has a greater percentage of fibers than do the portions of the barrel at either end of the insert. Inherently this provides the

bat with greater radial stiffness at the location of the insert and Vacek specifically points out in paragraph 45 that the insert is to be stiffer than the tubular hitting surface and that it enhances the hitting zone of the bat by increasing the trampoline effect. Because Vacek's structure regarding the bat having a stiffened mid section is identical to that claimed by applicant it will inherently provide the same function regarding the sweet spot recited by applicant. This increased stiffness of the bat at the location of the mid-section location insert relative to the portions of the bat barrel "commencing immediately adjacent to and extending respectively on either side of the mid-section" not covered on the inside by the insert is a change along the barrel length as in the present invention. As can clearly be seen in Fig. 2 of Vacek the insert does not extend the full length of the barrel and thus the properties of the barrel are varied in the same fashion as claimed.

Regarding claim 67/38, insert 112 is considered to be inserted into a single wall bat. In response to applicant's remarks concerning the claim 67 rejection an insert may be placed in a single wall bat or a multi-wall bat. This does not change the definition of the bat itself.

Concerning claim 68/38, the innermost layer of insert 112 is considered to be inserted into a multi-wall bat formed by the outer layers of insert 112 and the bat barrel into which it is inserted. In response to applicant's remarks for purposes of this rejection a "layer" may be considered a wall.

In response to applicant's remarks it is true that the end cap will stiffen the barrel. However, all that applicant's claims require is that the barrel wall be stiffer in the mid-section than in the immediately adjacent sections. Vacek's barrel wall will be stiffer

where the insert is located than it will be where the insert is not located - namely at the immediately adjacent sections.

Regarding the arguments on page 23 of the remarks concerning the "sweet spot" all that the claims require is that the barrel wall have a sweet spot, (which all barrel walls inherently have), and that mid-section include the sweet spot. Vacek's mid-section, defined by the examiner to be that section comprising the insert inherently includes the sweet spot which is what is required by the claims.

Regarding the "sweet spot", a sweet spot is considered that portion of the bat upon which it is preferential to hit the ball and is normally near the midpoint of the barrel. Vacek is directed at increasing the trampoline effect in the area in which his sleeve is supplied. Thus, the preferred hitting area relative to the area not having the sleeve is increased with the insert.

In further response to applicants' remarks concerning the rejection based on Vacek, Vacek has disclosed all of the structure claimed by applicant. Therefore, it inherently has to perform in the same manner and thus anticipates the claims under 35 U.S.C. 102. No structural element which causes applicant's device to perform differently has been claimed. The fact that Vacek does not address the term "sweet spot" does not negate that his disclosed structure is identical to that of applicant as it has been claimed.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 37, 39, 45/37, 45/39, 53, 54, 60/53, 60/54, 61/53, 61/54, 67/37, 67/39, 67/53, 67/54, 68/37, 68/39, 68/53, 68/54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vacek. Vacek teaches providing greater stiffness to the bat in the area of the insert. Vacek specifically teaches using a greater percentage of fibers in this area at paragraph 47. However, Vacek also notes that different materials may be used in the insert (paragraph 46) and that the fiber angle may be varied (paragraph 47). Varying the angle of fibers to be greater with regard to the longitudinal axis inherently provides greater radial stiffness and using a stiffer fiber type accomplishes the same result. It would have been obvious to one of ordinary skill in the art to have used either of these known means to provide the extra stiffness in the insert portion desired by Vacek. As the examiner has noted previously, different fibers comprise different stiffnesses. Such is now admitted prior art.

Regarding the last 2 lines of claim 53, Vacek's area of greater thickness is formed of the "same general material" (fiber composite) as the barrel wall portion.

Concerning the at least 5% limitation of claim 53, Vacek does not specifically disclose the relative thicknesses of the midpoint and lateral regions. However, given the breadth of the range claimed and the fact that no particular unexpected result is provided pertaining to the "at least 5%" limitation it would have been obvious to one of ordinary skill in the art to have used such a range depending on the strength desired in the bat. Applicant's arguments over claim 54 as now included in claim 53 are based on what the Fritzke reference teaches. Claim 54 is rejected based on Vacek alone.

Concerning the added limitations to claims 45 and 54, because Vacek's bat comprises the same structure it will inherently provide the same functions.

Regarding claim, 67/53 insert 112 is considered to be inserted into a single wall bat. In response to applicant's remarks concerning the claim 67 rejection an insert may be placed in a single wall bat or a multi-wall bat. This does not change the definition of the bat itself.

Concerning claim 68/53, the innermost layer of insert 112 is considered to be inserted into a multi-wall bat formed by the outer layers of insert 112 and the bat barrel into which it is inserted. In response to applicant's remarks for purposes of this rejection a "layer" may be considered a wall.

Claims 41, 42, 43, 44, 45, 63/53, 63/54, 64/63/53, 64/63/54, 65/63/53, 65/63/54, 66/63/53, 66/63/54, 69/53, 69/54, and 75 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vacek in view of Fritzke. Vacek discloses the claimed device with the exception of the shorter length of the midsection. Fritzke however discloses that such inserts may be shorter and located at the point of the sweet spot of the bat. While an exact length relative to the barrel length is not disclosed, it is clear from Fritzke's drawings that his insert provides the greatest radial stiffness at the sweet spot just as does applicant's insert. Fritzke at paragraph 76 states that composite layer insert 44 is about 8.5 inches long and composite insert layer 46 is about 4 inches long. Moreover, Fritzke teaches in paragraph 75 that composite bands of varying lengths may be used to allow the manufacturer to selectively add strength and stiffness where it is needed. Such bands may be applied to the impact portion or to an insert. Absent a showing of

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unexpected results the exact length of the mid-section would obviously have been up to the ordinarily skilled artisan depending on the particular bat characteristics desired by the batter in the bat.

Regarding claim 69, Fritzke teaches that composite inserts 44 and 46 may be used in conjunction in a graduated fashion to achieve the desired stiffness in the bat. With regard to applicant's remarks concerning the claim 69 rejection. The examiner is not asserting that Fritzke teaches the composite bat. Vacek teaches the composite bat. Fritzke teaches a means of stiffening a bat which would obviously have been applicable to a composite bat such as Vacek's.

Concerning claim 75, because the claimed structure is obviated it will inherently have to perform in the same manner.

As a first point in responding to applicant's arguments based on Fritzke it appears that applicant is referring to some Fritzke reference other than that which has been applied against the claims. The Fritzke reference which applied against the claims is Fritzke '022, published July, 11 2002, as was identified in the first office action mailed to applicant. This reference teaches the importance of increasing the sweet spot and the placement of the stiffening member at the sweet spot. (Paragraphs 6 and 15) The following remarks by the examiner are based on the reference actually used in the rejection.

As applicant notes, Fritzke in paragraph 8 at least contemplates the use of composite bat frames in regards to his invention. While this is not his preferred solution it is at least contemplated. Therefore, taking Fritzke with Vacek teaches that the use of

smaller tailored composite reinforcing bands within a composite bat would surely have been obvious to the ordinarily skilled artisan. Again, as applicant provides no showing of unexpected results the exact length of the mid-section would obviously have been up to the ordinarily skilled artisan depending on the particular bat characteristics desired by the batter in the bat.

Applicant's apparent assertion on page 26 of the remarks that Fritzke is directed towards non-polymer composites is without merit. Fritzke, at paragraphs 59 and 60 clearly indicates the use of polymer composites to form the reinforcement section.

Applicant's arguments on pages 35 and 36 of the remarks with regard to having shown unexpected results are all based on Fig. 10, which is not disclosed as relating to the Fig. 6 embodiment that is the subject of the instant claims. Moreover, Fig. 10 does not appear to show how the particular length of the mid-section relative to the sweet spot is unexpected. All Fig. 10 shows is a single length of mid-section with a corresponding sweet-spot.

Regarding applicant's comments as to Vacek and Fritzke taken together, in both cases the aim of using an insert is to stiffen the impact portion of the bat, (note paragraph 45 of Vacek and paragraph 75 of Fritzke. Also in both, the aim is to increase the "trampoline" (Vacek) or "spring" (Fritzke paragraph 69) effect in the bat. In both cases a composite insert is utilized. One of ordinary skill in the art considering the art as a whole would obviously conclude that because it was known to use composite inserts to stiffen composite bats as taught by Vacek the use of other composite inserts

known in the bat art to stiffen hollow bats as disclosed by Fritzke would also be useful to stiffen hollow composite bats.

Applicant's recognition of the applicability of *KSR International Co. v. Teleflex, Inc.*, 550 U.S. at ___, 82 USPQ2d at 1397 is well taken. As applicant points out, under KSR obtaining predictable results is an indicator of obviousness. Even were Fritzke not interested in increasing the size of the sweet spot in the instant case, it is clearly predictable that stiffening a bat at the sweet spot as taught by Fritzke will also stiffen a bat such as that of Vacek in the same manner. There is no requirement under KSR that the result predicted need be that which applicant predicts.

Note MPEP 2141, "The Court in KSR stated that "[t]he first error...in this case was...holding that courts and patent examiners should look only to the problem the patentee was trying to solve. The Court of Appeals failed to recognize that the problem motivating the patentee may be only one of many addressed by the patent's subject matter...The second error [was]...that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem." 550 U.S. at ___, 82 USPQ2d at 1397. Federal Circuit case law prior to the Supreme Court's decision in KSR is generally in accord with these statements by the KSR Court. See e.g., *In re Dillon*, 919 F.2d 688, 693, 16 USPQ2d 1897, 1902 (Fed. Cir. 1990) (en banc) ("[I]t is not necessary in order to establish a prima facie case of obviousness that both a structural similarity between a claimed and prior art compound (or a key component of a composition) be shown and that there be a suggestion in or

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expectation from the prior art that the claimed compound or composition will have the same or a similar utility as one newly discovered by applicant," (emphasis added).

Applicant's argument that there is a requirement that Vacek as modified by Fritzke need predict an enlarged sweet spot is not tenable. Likewise the arguments on pages 29-31 of the remarks cannot be considered credible in light of the above analysis.

Applicant's arguments pertaining to claims 55, 56, and 62 on pages 38 and 39 of the remarks are noted. However, claims 55, 56, and 62 are withdrawn from consideration because they are directed towards a non-elected embodiment, and thus the arguments thereover are not germane to the rejections at hand. The same is true of the declaration under 37 CFR 1.132 as was noted in the 7/14/06 office action.

Applicant's arguments filed 12/21/07 have been fully considered but they are not persuasive.

Regarding the request for an interview such is once more noted. Again, two formal interviews have already been held on this application on the issues currently presented by applicant, as well as several informal discussions. If applicant has any questions regarding the instant action he is free to contact the examiner.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication should be directed to Mark S. Graham at telephone number 571-272-4410.

MSG
5/8/08

/Mark S. Graham/
Primary Examiner, Art Unit 3711